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AZ CORP COMMISSION  
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

In the matter of:

CONCORDIA FINANCING COMPANY,  
LTD,

a/k/a "CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY SERVICES,  
LLC,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Respondents.

Docket No. S-20906A-14-0063

(Assigned to the Honorable Mark  
Preney, Administrative Law Judge)

Oral Argument Requested

Arizona Corporation Commission

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**MOTION TO DISMISS AND ANSWER**

**Of**

**Respondents ER Financial & Advisory Services, LLC,  
Lance Michael Bersch, David John Wanzek, and Linda Wanzek**

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**MOTION TO DISMISS**

**I. Introduction.**

ER Financial Advisory Services, LLC, a dissolved Arizona limited liability company<sup>1</sup>, Lance Michael Bersch, David John Wanzek (collectively, the “ER Respondents”) and Linda Wanzek (“Mrs. Wanzek”) move to dismiss the Notice of Opportunity (“Notice”) filed by the Securities Division on February 27, 2014. The Notice should be dismissed for four reasons:

1) The allegations in the Notice stretch back to 1994 – twenty years ago. It will be impossible for the ER Respondents and Mrs. Wanzek to defend these allegations regarding these long-ago events. Thus, the Notice should be dismissed on both Statute of Limitations and Due Process grounds. Further, as a matter of policy, limited Commission resources should not be expended on such a stale matter.

2) The Servicing Agreements are simply commercial loans for buying “big rig” trucks. These agreements are not “securities” because they do not involve a common enterprise, and because they do not involve the expectation of profits derived solely through the efforts of others. Rather, the agreements involve separate loans, and any profit is dependent on the trucker paying the loan back, not the efforts of the promoter, Concordia.

3) The Notice fails to provide allegations that are clear and specific enough for the ER Respondents and Mrs. Wanzek to adequately respond to them and prepare a defense. This lack of clear, specific allegations is especially troubling for the “fraud” allegations, because fraud must be pled with specificity.

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<sup>1</sup> ER Financial & Advisory Services, LLC joins in this Motion to Dismiss and Answer only to the extent that it exists and is capable of being sued or named as a respondent in this action. As the Notice alleges (¶ 3), ER filed Articles of Termination and the Commission issued a Certificate of Termination to ER, and ER’s existence is thus terminated.

1           4)     Mrs. Wanzek had no involvement whatsoever with the alleged conduct. She  
2 is named only to assert a claim against an Arizona marital community. But she moved to  
3 Florida four years ago. There is no Arizona marital community to make allegations  
4 against. Moreover, Florida is not even a community property state, so there isn't a Florida  
5 marital community either. There is no reason to drag Mrs. Wanzek into this case, and she  
6 should be promptly dismissed.

7     **II.     Motions to dismiss are authorized and serve an important purpose.**

8           Motions to dismiss are specifically allowed by the Commission's rules, which  
9 provide that the "answer shall include a motion to dismiss if a party desires to challenge  
10 the sufficiency of the complaint." A.A.C. R14-3-106(H). The Commission must follow  
11 its own rules. *Gibbons v. Arizona Corp. Comm'n*, 95 Ariz. 343, 347, 390 P.2d 582, 585  
12 (1964). That obligation includes the Commission's motion to dismiss rule, which would  
13 be rendered a nullity if motions to dismiss are not addressed on their merits. Thus,  
14 inadequate Notices of Opportunity should be dismissed. *See* Decision No. 74036 (August  
15 16, 2013)(granting motion to dismiss certain counts of a complaint against Johnson  
16 Utilities, LLC).

17           In addition, motions to dismiss serve an important purpose in the legal system. As  
18 the United States Supreme Court recently explained, "Litigation... exacts heavy costs in  
19 terms of efficiency and expenditure of valuable time and resources" and therefore  
20 Plaintiffs must submit a well-pleaded complaint or their case should be dismissed on a  
21 motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *see also Hiland Dairy,*  
22 *Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968)(explaining that a "motion to dismiss  
23 for failure to state a cause of action can serve a useful purpose in disposing of legal issues  
24 with a minimum of time and expense to the interested parties").

25           The burden of defending this case will be very great. The Division's Notice  
26 includes allegations dating back to 1994. Reconstructing accounts from so long ago  
27

1 would be a herculean task. The ER Respondents and Mrs. Wanzek must retain lawyers to  
2 defend them, at great expense. As described below, the allegations of the Notice are  
3 inadequate, and relate to long-ago actions. It would be unfair to force the ER  
4 Respondents and Mrs. Wanzek into a ruinously expensive litigation process, when the  
5 Notice does not contain allegations sufficient to support a claim for relief. Instead, the  
6 Notice should be dismissed, as expressly allowed by the Commission's rules.

7 **III. The events alleged in the Notice are far too old.**

8 **A. The allegations in the Notice stretch back 20 years.**

9 The allegations in the Notice relate to events from long ago. The Notice alleges  
10 that Concordia "was incorporated in California in 1994 with the purpose of purchasing  
11 and servicing contracts for the sale of pre-owned, Class 8 "big rig" trucks...." (Notice ¶  
12 8). The year 1994 was 20 years ago. Babies born that year are adults now, able to vote,  
13 and soon, to drink. "Netscape Navigator", the first graphical web browser, was first  
14 released in 1994. The first episode of "Friends" aired in 1994. Bill Clinton was the  
15 President, and NAFTA took effect. Cell phones were still rare and bulky.

16 The Notice alleges that "About 1998, Bersch and Wanzek began offering and  
17 selling investment in Concordia" and that ER was formed in 2001. (Notice ¶ 15). The  
18 Notice very carefully avoids giving the date of any specific alleged sales. This is because  
19 the vast majority of alleged sales occurred many years ago.

20 Of course, the Division cannot cure the staleness of its claims merely by refusing  
21 to give dates for the alleged transactions. Under Rule 9(f), Arizona Rules of Civil  
22 Procedure<sup>2</sup>, "For the purpose of testing the sufficiency of a pleading, averments of time  
23 and place are material and shall be considered like all other averments of material  
24 matter." As Wright & Miller explain (regarding the parallel federal rule), because "Rule

25 \_\_\_\_\_  
26 <sup>2</sup> Under the Commission's Rules of Practice and Procedure, the Rules of Civil Procedure apply in  
27 the absence of a contrary Commission Rule. A.A.C. R14-3-101(A).

1 9(f) makes allegations of time material... the defense of the statute [of limitations] may  
2 be raised on a motion to dismiss... when it is apparent from the face of the complaint that  
3 the time limit for bringing the claim for relief has passed.” Wright & Miller, *Federal*  
4 *Practice and Procedure Civil* § 1308 (3d ed.). In other words, the Division “cannot  
5 escape the statute” of limitations “by saying nothing.” See *Bishop v. Lucent*  
6 *Technologies, Inc.*, 520 F.3d 516, 520 (6th Cir. 2008)(quotation marks and citation  
7 omitted).

8 **B. The Notice should be dismissed under the Statute of Limitations.**

9 The Arizona Securities Act (“ASA”) includes a Statute of Limitations. A.R.S. §  
10 44-2004. For alleged violations of A.R.S. § 44-1841 (Count 1 of the Notice, ¶¶ 34-36)  
11 and § 44-1842 (Count 2 of the Notice, page 9), the Statute of Limitations is one year.  
12 A.R.S. § 44-2004(A). For alleged violations of A.R.S. § 1991 (Count 3 of the Notice,  
13 pages 9-10), the Statute of Limitations is two years. A.R.S. § 44-2004(B).

14 The Division may rely on the phrase “civil action” in A.R.S. § 44-2004 to argue that  
15 the Statute applies only to court cases, and that the Division is therefore free from any  
16 Statute of Limitations. Any such argument must be firmly rejected. An argument that  
17 would allow the Division to pursue violations back to statehood, or perhaps into territorial  
18 days, is absurd and contrary to the spirit of the law. Indeed, American law has long  
19 opposed such unlimited claims to government power. See *3M Co. v. Browner*, 17 F.3d  
20 1453, 1455-1457 (D.C. Cir. 1994)(quoting *Adams v. Woods*, 6 U.S. 336, 341 (1805)(per  
21 Marshall, C.J.)(“In a country where not even treason can be prosecuted after a lapse of  
22 three years, it could scarcely be supposed that an individual would remain forever liable to  
23 a pecuniary forfeiture.”).

24 Here, the Notice alleges very stale and technical securities law violations against the  
25 Respondents. In contrast, most serious felonies cannot be pursued if they are that old. In  
26 Arizona, the statute of limitations for almost all felonies (Class 2 through Class 6) is seven  
27 years. A.R.S. § 13-107. This seven year statute of limitations applies to many very serious

1 crimes, including Kidnapping (A.R.S. § 13-1304), Aggravated Assault (A.R.S. § 13-1204),  
2 Arson of an Occupied Structure (A.R.S. § 13-1704), Armed Robbery (A.R.S. § 13-1904),  
3 and Sale of Narcotic Drugs (A.R.S. § 13-3408). In the words of *3M* and *Adams*, "it could  
4 scarcely be supposed" that the Respondents can be "forever liable" for the alleged  
5 technical violations of the Securities Act that occurred nine, ten or even twenty years ago,  
6 when such serious felonies cannot be pursued after seven years.

7 Moreover, there is a federal Statute of Limitations that bars the SEC and other  
8 agencies from pursuing administrative enforcement actions after five years. This federal  
9 Statute of Limitations is 28 U.S.C. § 2462, which provides:

10 Except as otherwise provided by Act of Congress, an action, suit or  
11 proceeding for the enforcement of any civil fine, penalty, or forfeiture,  
12 pecuniary or otherwise, shall not be entertained unless commenced within  
13 five years from the date when the claim first accrued if, within the same  
14 period, the offender or the property is found within the United States in order  
15 that proper service may be made thereon.

16 In the *3M* case, the D.C. Circuit found that the language "action, suit or proceeding"  
17 extends to administrative cases before an agency (in that case, the EPA). The D.C. Circuit  
18 explained the need for Statutes of Limitations: "after the passage of time evidence has been  
19 lost, memories have faded, and witnesses have disappeared." *3M Co. v. Browner*, 17 F.3d  
20 1453, 1455-1457 (D.C. Cir. 1994) quoting *Order of Railroad Telegraphers v. Railway*  
21 *Express Agency*, 321 U.S. 342, 349-49 (1944). The D.C. Circuit reasoned that Statutes of  
22 Limitation like § 2462 reflect Congress' judgment that there comes a time when a citizen  
23 "ought to be secure in his reasonable expectation that the slate has been wiped clean of  
24 ancient obligations." *Id.* The Court also reasoned that in the absence of a Statute of  
25 Limitations, long-delayed government enforcement actions would upset the "settled  
26 expectations" of defendants. *Id.*

27 Two years later, the D.C. Circuit rejected the SEC's argument that this Statute of  
Limitations does not apply to SEC administrative enforcement cases. *Johnson v. S.E.C.*, 87



1 F.3d 484, 492 (D.C. Cir. 1996). The SEC argued that laws protecting the public should be  
2 exempt from the Statute of Limitations. The Court strongly disagreed, noting that:

3 Whatever prejudice there may have been in ancient times against statutes of  
4 limitations, it is a cardinal principle of modern law and of this court, that  
5 they... are not to be construed so as to defeat their obvious intent to secure  
6 the prompt enforcement of claims during the lives of the witnesses, and  
when their recollection may be presumed to be still unimpaired.

7 *Id.*, quoting *Campbell v. City of Haverhill*, 155 U.S. 610, 617 (1895). Thus, the SEC could  
8 not pursue an administrative enforcement action for claims this old. There is no reason the  
9 ACC should be able to tread where the SEC cannot.

10 The Supreme Court recently addressed these same concerns, unanimously  
11 confirming that § 2462 applies to SEC enforcement actions. *Gabelli v. SEC*, 133 S.Ct.  
12 1216, 1219 (2013). Quoting Chief Justice Marshall, the Court stated that it “would be  
13 utterly repugnant to the genius of our laws” if enforcement actions could “be brought at any  
14 distance of time.” *Id.*, 133 S. Ct. at 1223. The Court emphasized the importance of time  
15 limits in our legal system:

16 Statutes of limitations are intended to “promote justice by preventing  
17 surprises through the revival of claims that have been allowed to slumber  
18 until evidence has been lost, memories have faded, and witnesses have  
19 disappeared.” *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321  
20 U.S. 342, 348–349, 64 S.Ct. 582, 88 L.Ed. 788 (1944). They provide  
21 “security and stability to human affairs.” *Wood v. Carpenter*, 101 U.S. 135,  
22 139, 25 L.Ed. 807 (1879). We have deemed them “vital to the welfare of  
society,” *ibid.*, and concluded that “even wrongdoers are entitled to assume  
that their sins may be forgotten,” *Wilson v. Garcia*, 471 U.S. 261, 271, 105  
S.Ct. 1938, 85 L.Ed.2d 254 (1985).

23 *Id.*, 133 S. Ct. at 1221. The unanimous teaching of *Gabelli*, that Statutes of Limitations  
24 “promote justice” and are “vital to the welfare of society”, applies with great force here.  
25  
26  
27

1 Arizona securities law is strongly influenced by federal securities law. *See e.g.*  
2 *Sell v. Gama*, 231 Ariz. 323, 327, 295 P.3d 421, 425 (2013)(“we will interpret the ASA  
3 by following settled federal securities law unless there is a good reason to depart from  
4 that authority”). The Arizona Legislature included a specific Statute of Limitations in the  
5 ASA, namely A.R.S. § 44-2004. Following federal law, the Commission should find that  
6 a “Civil Action” as used in A.R.S. § 44-2004, includes an administrative enforcement  
7 action by the government. *See e.g. 3M Co. v. Browner, supra.; Johnson v. SEC, supra;*  
8 *see also Black’s Law Dictionary* (9th Ed. 2009) at p. 34 (defining “Civil Action” as *inter*  
9 *alia* “a noncriminal litigation”). Moreover, when the ASA wishes to refer to private court  
10 litigation, it uses the term “private action”, not “civil action”. *See* A.R.S. §§ 44-2081 to  
11 44-2085.

12 Further, the Division relies on A.R.S. § 44-2031(C) to include Mrs. Wanzek in this  
13 case. (Notice ¶ 6). That statute provides that “The commission may join the spouse in  
14 any action authorized by this chapter to determine the liability of the marital community.”  
15 Apparently, the Division interprets the word “action” in this statute as applying to  
16 administrative enforcement actions like this case. The Division can’t have it both ways,  
17 either “actions” include administrative enforcement actions before the Commission, or  
18 they don’t.

19 **C. The Notice should be dismissed on Due Process grounds.**

20 The Commission must provide each party due process of law. *See e.g. State ex rel.*  
21 *Corbin v. Arizona Corp. Comm’n*, 143 Ariz. 219, 226, 693 P.2d 362, 369 (Ct. App. 1984)  
22 (“right to a fair hearing”); *State ex rel. Arizona Corp. Comm’n v. Bionomics Int’l, Ltd.*, 25  
23 Ariz. App. 373, 376, 543 P.2d 802, 805 (1975); *S. Pac. Co. v. Arizona Corp. Comm’n*, 98  
24 Ariz. 339, 347, 404 P.2d 692, 697 (1965). Here, the events alleged in the Notice are so  
25 stale that it would not be fair to proceed.  
26  
27

1 The Division seeks to punish the ER Respondents and Mrs. Wanzek for actions in  
2 1994, or 1998, or 2001 or at other unspecified, but long-ago times. The concerns of  
3 *Gabelli* and *Railroad Telegraphers* about lost evidence, faded memories, and missing  
4 witnesses are very strong in a case based on facts this stale. Over the last ten to twenty  
5 years, witnesses have moved or passed away, memories have faded, and important  
6 business records have likely been lost or disposed of in the ordinary course of business. It  
7 is not fair to put Mr. Wanzek and Mr. Bersch on trial, facing potentially great monetary  
8 sanctions, as well as charges that directly attack their character, after so lengthy a period  
9 of time. Accordingly, the Notice should be dismissed. *See e.g. State ex. rel. Fillinger v.*  
10 *Rhodes*, 741 S.E.2d 118, 125 (W. Va. 2013)(Board “effectively denied the petitioner an  
11 opportunity to be heard in opposition to the allegations against her” due to excessive  
12 delay).

13 **D. In any event, Commission resources should not be expended on this**  
14 **stale matter.**

15 Further, even if the claims in the Notice are not technically barred by the Statute of  
16 Limitations in A.R.S. § 44-2004, or by due process, the Commission should exercise its  
17 discretion and administratively close this docket due to the stale nature of the claims. The  
18 Commission has limited resources, which should not be expended on such matters.

19 **IV. The Servicing Agreements are not securities.**

20 **A. The Servicing Agreements could only be securities if they are**  
21 **“investment contracts”.**

22 The Notice alleges that the “Servicing Agreements” are “securities”. (Notice ¶¶ 8-  
23 10, 31). In order to fit the statutory definition of security, the agreements must be  
24 “investment contracts.” The Servicing Agreements are not investment contracts because  
25 they do not involve a “common enterprise”, and they do carry an expectation of profit  
26 solely derived through the efforts of others. Instead, the Servicing Agreements involve  
27

1 simple loans to truck drivers to buy “big rigs”; any profit comes from the truck driver  
2 repaying the loan, not through the efforts or profits of Respondent Concordia.

3 The Notice alleges that Concordia entered into “Truck Financing Contracts” and  
4 related “Servicing Agreements”. (Notice ¶¶ 8-10). The Truck Financing Contracts were  
5 loans to owner-operators to buy used “big rig” trucks. The Notice alleges that, under the  
6 Serving Agreement “Concordia agreed to sell, assign and transfer to the investor a specific  
7 Truck Financing Contracts or Contracts” and that the buyer agreed “to fund the investment  
8 and hire Concordia to service any assigned Truck Financing Contract.” (Notice ¶ 9). The  
9 Notice further alleges that the Servicing Agreement “incorporates a Custodial Agreement”,  
10 under which “a custodian is to hold the Truck Financing Contracts assigned to a Servicing  
11 Agreements and hold titles to the vehicles subject to those Truck Financing Contracts.”  
12 (Notice ¶ 10). The Division does not attach a Servicing Agreement to the Notice, but  
13 because the Notice refers to and discusses the Servicing Agreement, the Commission may  
14 consider a copy of the agreement in evaluating this motion to dismiss. *See Strategic Dev.*  
15 *& Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, 226 P.3d 1046, 1050  
16 (Ct. App. 2010). Accordingly, a blank Servicing Agreement is attached as Exhibit 1.

17 The Notice alleges that the Servicing Agreements are securities but were not  
18 registered with the ACC. (Notice ¶ 31). The Servicing Agreement can be considered a  
19 security only if it is an “investment contract”. A.R.S. § 44-1801(26)(defining “security” as  
20 including an “investment contract”). The ASA does not define an “investment contract”,  
21 but Arizona follows the so-called *Howey* test in defining the term “investment contract.”  
22 *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946); *Rose v. Dobras*, 128 Ariz. 209,  
23 211, 624 P.2d 887, 889 (Ct. App. 1981)(following *Howey*). Under the *Howey* test, the  
24 Division must prove the following three prongs to prove an investment contract: (1) the  
25 investment of money; (2) “in a common enterprise;” (3) with the expectation that they will  
26 earn a profit solely through the efforts of others. *Rose v. Dobras*, 128 Ariz. at 211, 624

1 P.2d at 889. The Division cannot prove either the second or third prong, and therefore the  
2 Servicing Agreements cannot be considered "securities". Thus, the Notice should be  
3 dismissed<sup>3</sup>.

4 **B. The Servicing Agreements are not investment contracts because there is**  
5 **no common enterprise.**

6 The second prong, "common enterprise" is shown by "vertical commonality" or  
7 "horizontal commonality." Horizontal commonality "requires that a pooling of funds  
8 collectively managed by a promoter or third party take place." *Vairo v. Clayden*, 153 Ariz.  
9 13, 17, 734 P.2d 110, 114 (Ct. App. 1987). Here, the Servicing Agreement provides for the  
10 investment in specific Truck Financing Contracts, not the investment in a pool of funds.  
11 Thus, there is no horizontal commonality.

12 The Division alleges that "in practice" Concordia did not follow the contracts, and  
13 in some cases, that Concordia "pooled" proceeds. (Notice ¶¶ 20-23). But whether the  
14 Servicing Agreements are securities is determined by what the contract says, not by post-  
15 contract practices. *See Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d  
16 1142, 1148 (Ct. App. 1986). Indeed, "what actually occurred, or in speculation what could  
17 have occurred, following the transaction is immaterial. The transaction must be  
18 characterized at the time when it transpired." *Id.* Moreover, the ER Respondents are not  
19 responsible for Concordia violating its contracts (if it did so, as the Notice alleges).

20 Vertical commonality requires "a positive correlation between the success of the  
21 investor and the success of the promoter without a pooling of funds." *Vairo, supra*. Here,  
22 the investor's success is dependent on the repayment of the loans, not the success of  
23 Concordia. In *Vairo*, the Court found no vertical or horizontal commonality in case  
24

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25 <sup>3</sup> The Notice also alleges that Concordia, in a few cases, sold "Promissory Notes". The Notice  
26 does not allege that the ER Respondents sold any Promissory Notes, so the notes are not relevant  
27 to whether the charges against the ER Respondents should be dismissed.

1 involving full recourse promissory notes. *Id.* That was because the investor's profit was  
2 determined by whether the notes were repaid, not the efforts of the promoter. The  
3 Servicing Agreements are like the notes at issue in *Vairo*. The investor is successful if the  
4 specific trucker repays the loan for his or her "big rig" truck. Thus, vertical commonality  
5 does not exist.

6  
7 **C. The Servicing Agreements are not investment contracts because they do  
not involve an expectation of profits solely through the efforts of others.**

8 The third prong of the *Howey* test requires the Division to demonstrate the  
9 "expectation that" the investor "will earn a profit solely through the efforts of others."  
10 Again, the investor's profit is determined by whether the truckers repay the specific loans  
11 with the specified rates of interest. The investor's profits are not dependent on the overall  
12 profits of Concordia, and indeed the investor in no way invests in equity of Concordia, only  
13 in specific loans to specific truckers.

14 Indeed, many cases hold that interest earned on a note is not "profit" or "efforts of  
15 others" within the meaning of the third prong of *Howey*. See *First Citizens Federal*  
16 *Savings and Loan Assoc. v. Worthen Bank and Trust Co.*, 919 F.2d 510, 515-16 (9th Cir.  
17 1990) (holding that a loan participation agreement was not an "investment contract" under  
18 Arizona law); *United American Bank of Nashville v. Gunter*, 620 F.2d 1108, 1115-1119  
19 (5th Cir. 1980)(interest income not "derived from managerial efforts" of lead lender in loan  
20 participation); *Union Bank of Little Rock v. Farmers Bank*, 786 F.2d 881, 885 (8th Cir.  
21 1986) (fixed interest not considered profit within meaning of *Howey* test; return was based  
22 upon borrower's ability to repay rather than administrative efforts of seller of note). As the  
23 9<sup>th</sup> Circuit explained in *First Citizens*:

24  
25 In the Agreement, First Citizens agreed to provide a certain percentage of  
26 the development loan for an agreed rate of interest, subject to all the  
27 specified rights and obligations found in the loan documents between

1 Worthen and the borrower. At the time the Agreement transpired, First  
2 Citizens was simply a secured lender of a portion of a large loan with a set  
3 interest rate that was not dependent on the managerial or entrepreneurial  
4 skills of Worthen Bank or of the borrower. First Citizens provides no  
5 evidence that at the time it entered into the Agreement it sought an  
6 investment or thought it was making an investment in Worthen Bank or the  
7 borrower rather than entering into a commercial loan transaction.  
8 Accordingly, we find that the Agreement is not an "investment contract"...

9 *First Citizens*, 919 F.2d at 516.

10 **D. In summary, the Servicing Agreements are commercial loan  
11 transactions, not "securities."**

12 The Servicing Agreements in this case are very similar to the loan participation  
13 agreements discussed in *First Citizens*. Just as in *First Citizens*, the contracts here allow an  
14 investor to buy a loan. Thus, each contract is simply a "commercial loan transaction", and  
15 not an "investment contract."

16 Because the Division cannot satisfy either the second or third prongs of the *Howey*  
17 test, the Servicing Agreements are not securities. Thus, all claims in the Notice regarding  
18 the Servicing Agreements must be dismissed. And because the Notice does not allege that  
19 the ER Respondents sold the alleged promissory notes, the Notice should be dismissed  
20 against the ER Respondents in full.

21 **V. The Notice fails to adequately plead clear and specific allegations.**

22 **A. The Notice does not give fair notice to the Respondents of the charges  
23 against them.**

24 The purpose of a complaint is to "give the opponent fair notice of the nature and  
25 basis of the claim." *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28  
26 (1956). Therefore, where a complaint brings claims against multiple defendants, the  
27 complaint must allege facts sufficient to demonstrate that the claimant is entitled to relief  
against each defendant or respondent. Otherwise, the defendant will not have notice of  
the basis of the claims against him or her, as opposed to the other defendants. Thus,

1 “[w]here a complaint pleads facts that are merely consistent with a defendant's liability”,  
2 the complaint must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(internal  
3 citations and quotation marks removed).

4 In addition, as a matter of due process, the Commission must provide each  
5 Respondent with a “reasonable definite statement of the charges.” *Sulger v. Arizona*  
6 *Corp. Comm'n*, 5 Ariz. App. 69, 73, 423 P.2d 145, 149 (1967).

7 Here, the notice fails to give fair notice of which allegations are being made against  
8 which Respondents. Instead, the Respondents are generally lumped together. For  
9 example, the Notice alleges that Concordia raised investments from “about 192 investors,  
10 approximately 116 of which are Arizona residents.” (Notice ¶ 26). The Notice does not  
11 say when these alleged sales were made. Nor does the Notice break down which alleged  
12 sales were made by which Respondent (or non-respondent). Likewise, the Notice alleges  
13 that “Bersch or Wanzek, individually or though [ER]” showed “presentation materials” that  
14 contained various statements. (Notice, ¶ 17). Which materials were used with which  
15 investors? Which Respondent showed the material to any particular investor?

16 Nor are the Notice’s allegations regarding restitution any clearer. The Notice makes  
17 a generic request for restitution, but does not state how much restitution the Division seeks  
18 from Mr. Wanzek, Mrs. Wanzek, or Mr. Bersch. (Notice, page 10).

19 **B. The Notice fails to plead fraud with particularity.**

20 All allegations of fraud must be pled with particularity. Rule 9(b), Arizona Rules  
21 of Civil Procedure; *Orca Commc'ns Unlimited, LLC v. Noder*, 233 Ariz. 411, 314 P.3d  
22 89, 99 (Ct. App. 2013). This means that “bare allegations that a thing is “fraudulent” are  
23 insufficient” *Spudnuts, Inc. v. Lane*, 131 Ariz. 424, 426, 641 P.2d 912, 914 (Ct. App.  
24 1982). In other words, “[a]lthough there is no ‘magic language’ required to state a claim  
25 for fraud,” a claimant must “plead all the essential elements of ... fraud” *Green v. Lisa*



1 *Frank, Inc.*, 221 Ariz. 138, 155-56, 211 P.3d 16, 33-34 (Ct. App. 2009)(quotation marks  
2 and citation omitted).

3 To satisfy Rule 9(b), there must be specific alleged facts regarding the time, place,  
4 and specific content of the alleged false representations, how or why the representations  
5 were false or misleading, as well as the identities of the parties to the alleged false  
6 representations and their role. *Lancaster Cmty. Hosp. v. Antelope Valley Dist.*, 940 F.2d  
7 397, 405 (9th Cir. 1991) (requiring pleader of fraud to detail with particularity the time,  
8 place, and manner of each act of fraud, plus the role of each defendant to each scheme);  
9 *see also Schreiber Distrib. Co. v. ServWell Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.  
10 1986); *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)(“Averments  
11 of fraud must be accompanied by the who, what, when, where, and how of the  
12 misconduct charged.”).

13 Here, the fraud count in the Notice has few specifics. The fraud count alleges that  
14 “Bersch and/or Wanzek, individually or though [ER] mislead investors” by “among other  
15 things”, making three alleged representations. (Notice, pages 9-10). But the Notice does  
16 not allege who these representations were made to, or whether they were made by Mr.  
17 Bersch or Mr. Wanzek. The Division alleges that there were 192 investors. Mr. Bersch  
18 and Mr. Wanzek are left to guess which ones the Division thinks heard these alleged  
19 representations, and they must also guess which one of them the Division thinks made the  
20 representation. It is easy enough to plead with particularity, “Investor A heard  
21 representation XYZ from Respondent so and so.” The Division fails to provide these basic  
22 allegations, which are necessary for the ER Respondents to frame an Answer and prepare a  
23 defense. The use of “and/or” and “among other things” in the fraud count is a red flag that  
24 these allegations are not pled with particularity.

1 In short, the Notice fails to give the ER Respondents and Mrs. Wanzek a clear and  
2 fair statement of the charges against them, fails to plead fraud with particularity, and  
3 should be dismissed.

4 **VI. Mrs. Wanzek has no involvement, and there is no Arizona marital community**  
5 **to justify naming her.**

6 Lastly, the Notice states that Mrs. Wanzek “is joined in this action under A.R.S. §  
7 44-2031(C) solely for the purposes of determining the liability of the martial community.”  
8 (Notice ¶ 6). But there is no marital community. Mr. and Mrs. Wanzek reside in Florida.  
9 Mrs. Wanzek has lived there since April 2010 – four years. (See Affidavit of Linda  
10 Wanzek, attached as Exhibit 2).<sup>4</sup> Florida is not a community property state. There is no  
11 marital community to proceed against. Mrs. Wanzek should be dismissed.

12 **ANSWER OF MRS. WANZEK**

13 Importantly, Mrs. Wanzek had absolutely no involvement whatsoever with regard to  
14 the allegations in the Notice. Therefore, Mrs. Wanzek’s response to each and every  
15 allegation is that she is without sufficient information to form a belief as to each allegation  
16 and, therefore, denies every allegation.

17 **ANSWER OF THE ER RESPONDENTS**

18 1. Answering Paragraph 1 of the Notice, the ER Respondents state that this  
19 allegation is a legal conclusion that does not require a response. In addition, the ER  
20 Respondents deny that the Commission has any Constitutional authority in this matter. *See*  
21 *Corporation Comm’n v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443 (1939)  
22 (holding that the Arizona Corporation Commission’s constitutional authority is limited to  
23 setting utility rates).

24 2. Answering Paragraph 2 of the Notice, the ER Respondents state that they are  
25

26 <sup>4</sup> Affidavits regarding a jurisdictional issue may be considered in connection with a motion to  
27 dismiss. *See e.g. Moulton v. Napolitano*, 205 Ariz. 506, 510, 73 P.3d 637, 641 (Ct. App. 2003).

1 without sufficient information to form a belief as to the truth of the allegations and they  
2 accordingly deny the same.

3 3. Answering Paragraph 3 of the Notice, the ER Respondents state that the term  
4 "all relevant times" is not defined and is ambiguous. Therefore, the ER Respondents are  
5 without sufficient information to form a belief as to the truth of the allegation regarding  
6 "all relevant times" and they deny the same. The ER Respondents admit that ER was  
7 formed and terminated on or about the dates listed.

8 4. Answering Paragraph 4 of the Notice, the ER Respondents admit that Mr.  
9 Bersch resides in Arizona.

10 5. Answering Paragraph 5 of the Notice, the ER Respondents deny that Mr.  
11 Wanzek resides in Arizona, and state that Mr. Wanzek resides in Florida.

12 6. Answering Paragraph 6 of the Notice, the ER Respondents refer the  
13 Commission to the Answer of Mrs. Wanzek above, as well as the portion of the Motion to  
14 Dismiss addressing the joinder of Mrs. Wanzek.

15 7. Answering Paragraph 7 of the Notice, the ER Respondents state that this  
16 allegation is a legal conclusion that does not require a response. In addition, as already  
17 noted, there is no marital community as alleged in that paragraph. The ER Respondents  
18 deny any remaining allegation in this paragraph.

19 8. Answering Paragraph 8 of the Notice, the ER Respondents state that they are  
20 without sufficient information to form belief as to the truth of the allegations and they  
21 accordingly deny the same.

22 9. Answering Paragraph 9 of the Notice, the ER Respondents state that the term  
23 "majority of investors" is unclear. In addition, the ER Respondents state that the  
24 referenced documents speak for themselves and they deny any attempt to characterize  
25 them. Respondents deny any remaining allegations in Paragraph 9.

26 10. Answering Paragraph 10 of the Notice, the ER Respondents state that the  
27

1 referenced documents speak for themselves and they deny any attempt to characterize  
2 them. Respondents deny any remaining allegations in Paragraph 10.

3 11. Answering Paragraph 11 of the Notice, the ER Respondents state that they  
4 are without sufficient information to form a belief as to the truth of the allegations and they  
5 accordingly deny the same.

6 12. Answering Paragraph 12 of the Notice, the ER Respondents state that they  
7 are without sufficient information to form a belief as to the truth of the allegations and they  
8 accordingly deny the same. The ER Respondents further state that this allegation is  
9 misleading, because the issue is not the ability of the investors to direct the activities of  
10 Concordia, but rather, their ability to take ownership of the Truck Financing Contract and  
11 lien rights.

12 13. Answering Paragraph 13 of the Notice, the ER Respondents state that they  
13 are without sufficient information to form a belief as to the truth of the allegations and they  
14 accordingly deny the same.

15 14. Answering Paragraph 14 of the Notice, the ER Respondents state that the  
16 term "all relevant times" is not defined and is ambiguous. Therefore, the ER Respondents  
17 are they are without sufficient information to form a belief as to the truth of the allegation  
18 regarding "all relevant times" and they deny the same. The ER Respondents admit that  
19 Mr. Wanzek and Mr. Bersch are certified public accountants licensed in Arizona.

20 15. Answering Paragraph 15 of the Notice, the ER Respondents state that they  
21 are without sufficient information to form a belief as to the truth of the allegations and they  
22 accordingly deny the same.

23 16. Answering Paragraph 16, the ER Respondents state that the referenced  
24 documents speak for themselves and they deny any attempt to characterize them. The ER  
25 Respondents state that they are without sufficient information to form a belief as to the  
26 truth of the remaining allegations and they accordingly deny the same.

1           17. Answering Paragraph 17, the ER Respondents state that the referenced  
2 documents speak for themselves and they deny any attempt to characterize them. The ER  
3 Respondents state that they are without sufficient information to form a belief as to the  
4 truth of the remaining allegations and they accordingly deny the same.

5           18. Answering Paragraph 18, the ER Respondents state that the referenced  
6 documents speak for themselves and they deny any attempt to characterize them. The ER  
7 Respondents state that they are without sufficient information to form a belief as to the  
8 truth of the remaining allegations and they accordingly deny the same.

9           19. Answering Paragraph 19, the ER Respondents state that the referenced  
10 documents speak for themselves and they deny any attempt to characterize them. The ER  
11 Respondents state that they are without sufficient information to form a belief as to the  
12 truth of the remaining allegations and they accordingly deny the same.

13           20. Answering Paragraph 20, the ER Respondents state that they are without  
14 sufficient information to form a belief as to the truth of the allegations and they  
15 accordingly deny the same.

16           21. Answering Paragraph 21, the ER Respondents state that they are without  
17 sufficient information to form a belief as to the truth of the allegations and they  
18 accordingly deny the same.

19           22. Answering Paragraph 22, the ER Respondents state that they are without  
20 sufficient information to form a belief as to the truth of the allegations and they  
21 accordingly deny the same.

22           23. Answering Paragraph 23, the ER Respondents state that they are without  
23 sufficient information to form a belief as to the truth of the allegations and they  
24 accordingly deny the same.

25           24. Answering Paragraph 24, the ER Respondents state that they are without  
26 sufficient information to form a belief as to the truth of the allegations and they  
27

1 accordingly deny the same.

2 25. Answering Paragraph 25, the ER Respondents state that they are without  
3 sufficient information to form a belief as to the truth of the allegations and they  
4 accordingly deny the same.

5 26. Answering Paragraph 26, the ER Respondents state that they are without  
6 sufficient information to form a belief as to the truth of the allegations and they  
7 accordingly deny the same.

8 27. Answering Paragraph 27, the ER Respondents state that they are without  
9 sufficient information to form a belief as to the truth of the allegations and they  
10 accordingly deny the same.

11 28. Answering Paragraph 28, the ER Respondents state that they are without  
12 sufficient information to form a belief as to the truth of the allegations and they  
13 accordingly deny the same.

14 29. Answering Paragraph 29, the ER Respondents state that they are without  
15 sufficient information to form a belief as to the truth of the allegations and they  
16 accordingly deny the same.

17 30. Answering Paragraph 30, the ER Respondents state that they are without  
18 sufficient information to form a belief as to the truth of the allegations and they  
19 accordingly deny the same.

20 31. Answering Paragraph 31, the ER Respondents state that they are without  
21 sufficient information to form a belief as to the truth of the allegations and they  
22 accordingly deny the same.

23 32. Answering Paragraph 32, the ER Respondents state that they are without  
24 sufficient information to form a belief as to the truth of the allegations and they  
25 accordingly deny the same.

26 33. Answering Paragraph 33, the ER Respondents state that they are without  
27

1 sufficient information to form a belief as to the truth of the allegations and they  
2 accordingly deny the same.

3 34. The ER Respondents deny the allegations of Paragraph 34 of the Notice.  
4 The ER Respondents specifically deny that any securities were involved.

5 35. Answering Paragraph 35, the ER Respondents state that they are without  
6 sufficient information to form a belief as to the truth of the allegations and they  
7 accordingly deny the same.

8 36. The ER Respondents deny the allegations of Paragraph 36.

9 37. Answering the paragraphs (erroneously) numbered 1 through 5 on pages 9  
10 and 10 of the Notice, the ER Respondents deny the allegations of these Paragraphs.

11 38. The ER Respondents deny any and all allegations not specifically admitted  
12 herein.

### 13 **AFFIRMATIVE DEFENSES**

#### 14 **I. First Affirmative Defense - Statute of Limitations.**

15 39. The ER Respondents allege that claims in the Notice are barred by the Statute  
16 of Limitations.

17 40. The sales alleged in the Notice all took place more than two years ago.

18 41. The case is a "civil action" within the meaning of A.R.S. § 44-2004.

#### 19 20 **II. Second Affirmative Defense - Reasonable Reliance on Concordia.**

21 42. The ER Respondents relied on the assurances of Concordia that the contracts  
22 in question were not securities. The ER Respondents' reliance on Concordia was  
23 reasonable.

24 43. Throughout its existence, Concorida was represented by a reputable law firm  
25 or firms, a fact that the ER Respondents knew and relied on.

1           44. Throughout its existence, Concorida has been audited by a reputable  
2 accounting firm or firms, a fact that the ER Respondents knew and relied on.

3           45. Concordia also did business with a bank and other financial institutions, a  
4 fact that the ER Respondents knew and relied on.

5           46. The ER Respondents acted in good faith and in reasonable reliance on  
6 Concordia's assurances.

7 **III. Additional Affirmative Defenses.**

8           47. The application of A.R.S. § 44-2031(C) in this case exceeds the authority  
9 granted to the Commission by the Arizona Constitution.

10          48. To the extent the documents that were allegedly offered or sold are  
11 determined to be securities the ER Respondents and the subject documents are exempt  
12 from the registration provisions of the Arizona Securities Act.

13          49. All actions taken by the ER Respondents were taken for a proper purpose.

14          50. The claims set forth in the Notice are barred by waiver, estoppel, laches, or  
15 acquiescence.

16          51. The ER Respondents allege that they did not know, and in the exercise of  
17 reasonable care could not have known, of any alleged untrue statements or material  
18 omissions as set forth in the Notice.

19          52. The ER Respondents did not act with the requisite scienter.

20          53. The ER Respondents state that the alleged purchasers have suffered no  
21 injuries or damages as a result of the ER Respondents' acts.

22          54. The ER Respondents did not cause any damages.

23          55. The alleged purchasers relied on others, and not the ER Respondents, in  
24 connection with the matters at issue in the Notice.

25          56. An award of restitution is barred because the damages, if any, were caused by  
26 the purchasers' own acts or omissions.



1           57. Restitution is barred, in whole or in part, because purchasers failed to  
2 mitigate their damages.

3           58. The claims in the Notice and restitution are barred, in whole or in part,  
4 because purchasers' damages, if any, were caused by the acts of others over whom  
5 Respondent had no control, and for whose acts Respondent is not legally answerable.

6           59. The claims in the Notice and restitution are barred, in whole or in part,  
7 because purchasers' damages, if any, were caused by the intervening and/or superseding  
8 acts of others over whom ER Respondents had no control, and for whose acts the ER  
9 Respondents are not legally answerable.

10          60. The claims in the Notice and the requested restitution are barred, in whole or  
11 in part, because of payment, accord and satisfaction.

12          61. The claims in the Notice and the requested restitution are barred, in whole or  
13 in part, because of ratification.

14          62. The claims in the Notice and the requested restitution are precluded, in whole  
15 or in part, by offsets.

16          63. The claims in the Notice and the requested restitution are barred, in whole or  
17 in part, by the doctrine of contributory negligence.

18          64. The claims in the Notice and the requested restitution are barred, in whole or  
19 in part, because when damages were caused, in whole or in part, by factors beyond the ER  
20 Respondents' control including the unexpected and historic collapse of the used big rig  
21 financing market and the lack of liquidity in the economy caused, in part, by lenders'  
22 failures to fund development.

23          65. The ER Respondents allege such other affirmative defenses set forth in  
24 Arizona Rule of Civil Procedure 8(c), as may be determined to be applicable through  
25 discovery.

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PHOENIX, ARIZONA 85004  
TELEPHONE NO 602-256-6100  
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1 66. The ER Respondents reserves the right to amend this Answer to assert  
2 additional defenses after completion of appropriate discovery.

3 67. The alleged purchasers of the Servicing Agreements were aware of all  
4 material facts with respect to the Servicing Agreements and the Truck Financing  
5 Agreements.

6 68. The State of Arizona lacks personal jurisdiction over Linda Wanzek.

7 RESPECTFULLY SUBMITTED this 4th day of April, 2014.

8  
9 ROSKA DEWULF & PATTEN, PLC

10  
11 By   
12 Paul J. Roshka, Jr.  
13 Timothy J. Sabo  
14 One Arizona Center  
15 400 East Van Buren Street, Suite 800  
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17  
18  
19 Original + 13 copies of the foregoing  
20 filed this 4th day of April 2014, with:

21 Docket Control  
22 Arizona Corporation Commission  
23 1200 West Washington  
Phoenix, Arizona 85007

24 Copies of the foregoing hand-delivered/mailed  
25 this 4th day of April 2014, to:

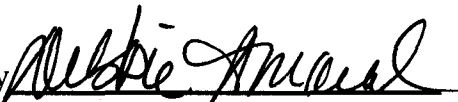
26 Lyn A. Farmer, Esq.  
27 Chief Administrative Law Judge

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15 By   
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23  
24  
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26  
27

# Exhibit

"1"

**CONCORDIA FINANCING CO., LTD.**

**Sale of Contracts and Servicing Agreement**

This Sale of Contracts and Servicing Agreement ("Agreement") is entered into to be effective as of \_\_\_\_\_, 2008 by and between Concordia Financing Co., Ltd., a California corporation ("Concordia"), and \_\_\_\_\_, a(n) \_\_\_\_\_ ("Investor") hereinafter collectively referred to as "the parties."

**RECITALS**

A. Concordia desires to obtain short term financing by factoring, selling and assigning to Investor certain truck (tractor and/or trailer) conditional sales contracts, and Concordia is willing to service such contracts for Investor.

B. Investor desires to purchase conditional sales contracts from Concordia on the terms and conditions stated herein, including but not limited to the mutual condition that Concordia service such contracts.

THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

**1. DEFINITIONS**

1.1 "Contracts" means those certain truck (tractor and/or trailer) conditional sales contracts listed in Exhibit A attached hereto, including all Substitute Contracts.

1.2 "Contract Default" means any of the following: a Customer fails to provide the insurance required by the Contract for a vehicle within 30 days after notice of the requirement to do so; a Customer fails to make three (3) consecutive monthly payments under the Contract; a Customer files any form of bankruptcy proceeding, or such proceeding is filed against a customer; a repossession is ordered for a vehicle under a Contract; or an insurance claim is made with respect to a vehicle under a Contract for repairs in excess of 25% of the value of the vehicle; or a Customer Dispute.

1.3 "Credit Problem" means the Customer is unable to pay trade debts due to insolvency and/or the filing of a Petition in Bankruptcy.

1.4 "Custodian" means \_\_\_\_\_, who shall hold the originally executed Contracts, with transferable title documents, pursuant to the terms of the Agreement.

1.5 "Customer" means the account debtor under a Contract.

1.6 "Customer Dispute" means any claim by Customer against Concordia, of any kind whatsoever, valid or invalid, that reduces the amount collectible from Customer by Investor.

1.7 "Dealer" means an existing licensed truck dealer who is named as the payee under a Contract and who has sold the Contract, at a discount, to Concordia.

1.8 "Default" shall have the meaning set forth in Section 11 hereof.

1.9 "Purchase Price" shall have the meaning set forth in Section 2 hereof.

1.10 "Substitute Contract" means a Contract having no known Contract Default which is delivered to the Custodian for transfer to Investor for the purpose of Investor replacing an existing Contract having an equal or lesser principal balance for which a Contract Default has occurred.

## 2. SALE OF CONTRACTS

Concordia hereby sells, assigns and transfers to Investor those Contracts described in Exhibit A, for a purchase price of \$\_\_\_\_\_ (the "Purchase Price"). From time to time monies may be added or taken. The balance will be shown in Exhibit A.

## 3. WARRANTIES

As an inducement for Investor to enter into this Agreement, and with full knowledge that the truth and accuracy of the warranties in this Agreement are being relied upon by Investor, Concordia warrants and covenants that:

3.1 Concordia's business is solvent, and to the best knowledge of Concordia, without any duty to investigate, the Dealers and the Customers named in the Contracts are solvent.

3.2 Concordia is the lawful owner of, and has good and undisputed title to, the Contracts.

3.3 Each Contract offered for sale to Investor is an accurate and undisputed statement of indebtedness by Customer for a sum certain of which is due and payable in accordance with the terms of such Contract, and, to the best knowledge of Concordia, is not subject to any defenses which would preclude payment by the Customer in accordance with the terms of the Contract.

3.4 To the best knowledge of Concordia, each Contract offered for sale to Investor is an accurate statement of a bonafide sale, deliver and acceptance of merchandise or performance of service by Dealer to Customer.

3.5 Concordia does not own, control or exercise dominion over, in any part or way whatsoever, the business of any Dealer having Contracts which are factored by Concordia to Investor under this Agreement.

3.6 Prior to purchasing a Contract from any Dealer, Concordia conducts a credit check of the Customer to determine the payment risk. The Contracts represent commercial sales, which means that the underlying vehicles will be used for business purposes and that the sales and the Contracts are governed by the California Commercial Code or the Commercial Code of the applicable state where the Dealer is located.

3.7 Within ten (10) business days after Concordia receives knowledge of any Contract Default, Concordia shall transfer and assign a Substitute Contract to Investor to replace the Contract having a Contract Default, by delivering such originally executed Substitute Contract to the Custodian with executed title transfer documents, and, within 2 business days after receipt of such Substitute Contract and related documents, the Custodian shall place the Contract having the Contract Default in the U.S. mail for return to Concordia.

#### 4. CUSTODIAN; DEFAULT

4.1 Upon execution of this Agreement, the originally executed Contracts and all evidences of title with respect to the vehicles covered by the Contracts, with separate assignments executed by Concordia which effect the assignment and transfer of the Contracts and title to the vehicles to Investor, shall be delivered by Concordia to the Custodian with a copy of this Agreement. The Custodian shall hold the Contracts for the benefit of Concordia and Investor. Contracts shall from time to time be released by the Custodian to Concordia, upon receipt of Concordia's written representation, a copy of which shall be mailed to Investor by Concordia as part of the monthly report required by Section 6.2 hereof, that the Contract to be released either (a) has been paid in full and must be returned to the Customer, or (b) has incurred a Contract Default and is to be concurrently replaced with a substitute Contract.

4.2 Upon any Default under this Agreement by Concordia, Investor shall concurrently notify Concordia and the Custodian of the Default, describing the Default specifically and in detail, and providing Concordia thirty (30) days from the date such written notice is received by Concordia to cure such Default. If Concordia fails to cure such Default within such 30-day cure period, Investor may, at its option, unilaterally instruct the Custodian to release to Investor the originally executed Contracts and all executed assignments then in the possession of the Custodian. Upon receipt of such originally executed Contracts and executed assignments, Investor may, at his option, and in addition to all other remedies available to Investor, file the title instruments and effect the legal transfer of title to Investor.

4.3 Assuming no Default by Concordia under this Agreement, the Custodian shall continue to hold the originally executed Contracts and all executed assignments of title until the earlier of (a) receipt of written instructions signed by both Concordia and Investor providing for the

disposition of such Contracts and assignments, (b) the payment in full, and release of all the Contracts to Concordia for return to the Customers.

## 5. FUNDING

Concurrently with the execution of this Agreement by the parties, and the delivery of the originally executed Contracts and executed title transfer documents by Concordia to the Custodian, Investor shall wire or deliver to Concordia funds in the full amount of the Purchase Price.

## 6. SERVICING AGREEMENT

6.1 Investor hereby engages and hires Concordia as its servicing agent for all servicing matters related to the Contracts, including but not limited to sending monthly invoices to Customers for payment, the collection of payments, correspondence and telephone communication with any Customer in default, imposition and collection of late payment fees and NSF check charges, initiation at Concordia's sole discretion of all collection decisions, actions and activities, including repossession, retention of attorneys or collection agents, making repairs to damaged vehicles, reselling repossessed vehicles and all other matters and decisions relating to the Contracts and the vehicles covered by the Contracts, as if in all respects Concordia remained the owner of the Contracts and had sole authority with respect to the collection and disposition of the Contracts.

6.2 As part of its responsibility as servicing agent for the Contracts, Concordia shall send monthly reports to Investor, together with Concordia's check for payment of funds then due to Investor from collected funds received by Concordia. The monthly servicing reports will report, for each Contract, the principal collected, the principal balance, and the interest due to Investor.

6.3 As its fee for servicing each Contract, Concordia shall be entitled to retain, during the entire term of the Contract, (a) all late payment fees, (b) all NSF charges, and (c) all interest and other fees or charges in excess of that amount required to pay Investor a \_\_\_\_\_ per month return (\_\_\_\_\_ per annum, simple interest) on the then existing principal balance due under the Contracts. Subject only to a Default under this Agreement by Concordia, and Concordia's failure to cure such Default within thirty (30) days after receipt of written notice from Investor describing such default in detail, the appointment of Concordia as the servicing agent for the Contracts under this Agreement is irrevocable and can be modified only with the prior written consent of Concordia, which consent may be withheld by Concordia for any reason whatsoever without regard to any standard of reasonableness.

## 7. SUBSEQUENT SALE OF CONTRACTS BY INVESTOR

7.1 Any attempt by Investor to sell, transfer or assign Investor's interest in any or all of the Contracts shall be void ab initio, unless prior to such sale, transfer or assignment (a) Investor first offers such Contracts to Concordia for purchase for 95% of the then existing principal balance due under the Contracts, and (b) Concordia fails to purchase such Contracts within ninety (90) days after receipt of written notice from Investor of Investor's intention to sell the Contracts,



which notice shall specifically reference this Section 7 and describe the Contracts which Investor intends to sell, the identity, address and telephone number of the prospective purchaser (the "Prospective Purchaser") and the terms of the proposed sale.

7.2 If Concordia elects to purchase the Contracts from Investor under Section 7.1, nothing contained herein shall preclude or prohibit the subsequent or concurrent sale by Concordia of the Contracts to the Prospective Purchaser, and in the event of such sale Concordia shall be entitled to retain any profit upon sale without any obligation to Investor.

7.3 If Concordia elects not to purchase the Contracts from Investor under Section 7.1, and Investor subsequently sells the Contracts to the Prospective Purchaser, then the Prospective Purchaser shall be bound by the terms of this Agreement, including but not limited to the servicing provisions of Section 6 hereof.

## 8. INVESTOR ACKNOWLEDGMENTS

Investor hereby acknowledges that the Contracts, if compared to other contracts which were rated under industry standards from "A" to "D", with "A" being high quality with financially strong Customers and/or considerable excess value in the vehicles subject to the Contracts; and "D" being low quality with substantially weaker Customers and much less protection in the value of the vehicles, the Contracts would probably be considered "C" or "D" grade. For that reason, delinquent Contracts will not be unusual and there may be a large number of Substitute Contracts. Investor further acknowledges the importance of utilizing an experienced servicing agent for such Contracts and for that reason specifically agrees that (a) the requirement under this Agreement that Concordia be retained as the servicing agent during the entire term of the Contracts is a material condition to Concordia's willingness to enter this Agreement, and (b) the servicing fees to be paid to Concordia hereunder are fair and reasonable.

## 9. ARBITRATION

At the election of either party, any controversy, claim or dispute of any kind or nature, arising out of or relating to this Agreement, or breach hereof, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and any judgment awarded or rendered by the arbitrator(s), may be entered in any court having jurisdiction hereof. All costs of arbitration, together with any legal, court, investigation, accounting, shall be paid by the losing party.

## 10. TERM AND TERMINATION

10.1 Term. This Agreement shall continue in effect until the earlier of (a) the mutual agreement of the parties to terminate the Agreement, as evidenced in a writing signed by both parties or (b) the payment in full of all the Contracts.

10.2 Termination Upon Default. Notwithstanding the foregoing, upon the occurrence of any Default by either party, and the defaulting party's failure to cure such Default within thirty (30) days after receipt of written notice from the non-defaulting party describing the Default in detail, then upon the election of the non-defaulting party and upon effective written notice to the defaulting party, this Agreement shall terminate.

## 11. DEFAULT AND REMEDIES

11.1 Default. Any one or more of the following shall constitute a default of this Agreement ("Default"):

- (a) Either party fails to pay any amount to the other party when due;
- (b) Either party breaches any term, provision, covenant, warranty or representation under this Agreement, any amendment hereto, or any other agreements or contracts between the parties;
- (c) A receiver or trustee is appointed for any or all of the assets of either party;
- (d) Either party becomes insolvent, ceases business operations, or is unable to pay debts as they mature, makes a general assignment for the benefit of creditors or voluntarily files under bankruptcy or similar law(s);
- (e) Any involuntary petition in bankruptcy is filed against either party and is not dismissed within 60 days;
- (f) Any levies of attachment, executions, tax assessment or similar process is issued against either party and is not released within thirty (30) days thereof; and/or
- (g) Any document, statement, writing, warranty, representation, report, certificate, financial statement made or delivered by either party to the other is incorrect, false, untrue or misleading in any material respect whatever.

11.2 Remedies After Default. In the event of any Default by Concordia has not been cured within 30 days after notice of such Default is received by Concordia, which notice to be effective must specifically describe the default, Investor may do any one or more of the following:

- (a) Notify the Custodian to release all the originally executed Contracts and title transfer instruments to Investor.
- (b) Directly notify any Customers and effect collections of Contracts and collect such Contracts, without payment of any further servicing fee to Concordia.

(c) Request Concordia to assemble the Contracts and all records pertaining to the Contracts and deliver them to Investor.

(d) Subject to subparagraph (e) below, exercise any other rights and/or remedies available to Investor under law or equity.

(e) Assign, transfer or sell the Contracts to a third party, but only after complying with Section 7 hereof, which shall survive any termination of the Agreement and any Default by Concordia.

11.3 Cumulative Rights. All rights, remedies and powers granted to the parties in this Agreement, or in any other agreement given by one party to the other, are cumulative and may be exercised singularly or concurrently with such other rights as the parties may have.

## 12. MISCELLANEOUS

12.1 Power of Attorney. In order to carry out the servicing requirements of this Agreement, Investor grants to Concordia an irrevocable power of attorney, coupled with an interest, authorizing and permitting Concordia (acting through any of its employees, attorneys or agents) at any time, at Concordia's option, with or without notice to Investor, to do any or all of the following in Investor's name or otherwise, its special attorney in fact, or agent, with power to:

(a) insert Concordia's remittance address on all Contracts purchased by Investor and being collected by Concordia;

(b) receive, open and dispose of all mail addressed to Investor from any Customer;

(c) endorse the name of Investor, or Investor's fictitious trade name, on any checks or other evidences of payment that may come into the possession of Concordia on Contracts purchased by Investor or pursuant to default on any other documents relating to any of the Contracts, and including but not limited to, amendments, notices to customers and any other documents necessary to carry out the purposes of this Agreement;

(d) in Concordia's name, as servicing agent for Investor, or otherwise, demand, sue for, collect, and give releases for any and all monies due or to become due on Contracts;

(e) compromise, prosecute, or defend any action, claim or proceeding as to said Contracts;

(f) from time to time offer a trade discount to a Customer exclusive of Concordia's normal business practice with said customer; and

(g) to do any and all things Concordia deems necessary and proper to carry out the purpose(s) of this Agreement.

12.2 Hold Harmless. Concordia agrees to indemnify and hold Investor harmless against any and all claims, losses, expenses, costs, obligations, liabilities, and attorneys' fees Investor may incur by reason of (i) Concordia's breach of or failure to perform any of its warranties, guarantees, commitments, or covenants in this Agreement; or (ii) Concordia's collecting or attempting to collect any Contracts.

12.3 Binding on Future Parties. This Agreement inures to the benefit of and is binding upon the heirs, executors, administrators, successors and assigns of the parties.

12.4 Written Waiver. A party may not waive its rights and remedies unless the waiver is in writing and signed by that party. A waiver of a party of any right or remedy under this Agreement on one occasion is not a waiver of any other right on that occasion, nor the waiver of that or any other right on any subsequent occasion.

12.5 Legal Fees. The prevailing party shall be entitled to receive all attorney's fees, costs and/or expenses ("Legal Fees") incurred by such party in enforcing this Agreement and any documents prepared in connection herewith, and/or protecting, preserving or enforcing any right granted under this Agreement, whether or not suit is brought. In any lawsuit, arbitration or other proceeding, including any and all appeals therefrom, the prevailing party shall be entitled to recover its Legal Fees wherever applicable.

12.6 California Law. This Agreement shall be governed by and construed both as to validity and performance and enforced in accordance with the laws of the State of California, without giving effect to the choice of law principles thereof.

12.7 Invalid Provisions. If any provision(s) of this Agreement shall be declared illegal, contrary to law or policy, or otherwise unenforceable, it is agreed that such provision shall be disregarded and that all other provisions of this Agreement shall remain in full force and effect as though such provision(s) had not been incorporated herein.

12.8 Entire Agreement. This Agreement, and any exhibits and schedules attached hereto, constitutes the entire agreement of the parties and supersedes all other prior agreements, understandings, representations and warranties, whether written or oral. This Agreement may be amended only by written agreement executed by the parties.

12.9 Notice. All notices, requests, demands, and other communications (collectively Notices) given or made pursuant to this Agreement shall be given if sent by telex, telecopy, fax, first class mail or by registered or certified mail, return receipt requested, postage and fees prepaid, or equivalent private messenger/delivery service offering signature acknowledgement by recipient (Fedex, UPS, etc.), or by personal delivery, to the address listed below, new addresses provided by the parties, or wherever located:

If to Concordia:

Concordia Financing Co., Ltd.

3633 E. Inland Empire Blvd., Ste 700  
Ontario, California 91764  
Fax: 909-483-2626  
ATTN: Chris Crowder

If to Investor:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12.10 Waiver of Jury Trial. \_\_\_\_\_ (Initial) BOTH INVESTOR AND CONCORDIA ACKNOWLEDGE THE EXTREME COST ATTENDANT TO TRIAL BY JURY, AND THEREFORE BOTH CLIENT AND CONCORDIA WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING OR TRANSACTION RELATING TO THIS AGREEMENT OR ANY AGREEMENT(S) RELATED HERETO.

Executed this \_\_\_\_ day of \_\_\_\_\_, 2008, at Ontario, California.

Concordia:

Concordia Financing Co., Ltd.  
a California corporation

By:

\_\_\_\_\_  
Christopher Crowder  
President

Investor:

\_\_\_\_\_  
\_\_\_\_\_

Exhibit A:

List of Contracts

Name of Customer

Dealer Principal Amount As of \_\_\_\_\_, 2008

Exhibit

"2"

**COMMISSIONERS**

BOB STUMP, Chairman  
GARY PIERCE  
BRENDA BURNS  
BOB BURNS  
SUSAN BITTER SMITH

**BEFORE THE ARIZONA CORPORATION COMMISSION**

In the matter of:

CONCORDIA FINANCING COMPANY, LTD,  
a/k/a "CONCORDIA FINANCE,"

Docket No. S-20906 A-14-0063

ER FINANCIAL & ADVISORY SERVICES,  
LLC,

LANCE MICHAEL BERSCH, and

**AFFIDAVIT OF LINDA WANZEK**

DAVID JOHN WANZEK and LINDA WANZEK,  
husband and wife,

Respondents.

---

STATE OF FLORIDA )

) ss.

County of Osceola )

LINDA WANZEK, having been duly sworn upon her oath, deposes and says:

1. I submit this affidavit in support of the Motion to Dismiss and Answer of Respondents ER Financial & Advisory Services, LLC, Lance Michael Bersch, David John Wanzek, and Linda Wanzek in this docket.
2. I make this Affidavit based on my own personal knowledge of the facts and review of pertinent records.
3. I am over 18 years of age and competent to testify.
4. I moved to Florida in April of 2010. Since that time, Florida has been my permanent residence.
5. I hold a Florida driver's license.
6. My minor children live with me in Florida. They attended school in Florida from August 2010 through March 2013. They are now home-schooled in Florida. One of my sons (age 16) has a Florida driver's license, and another son (age 15) has a Florida learner's permit.
7. I intend to remain in Florida as my permanent residence. I do not intend to resume

permanent residence in Arizona.

DATED this 2<sup>nd</sup> day of April, 2014



LINDA WANZEK

R.D. W52254639080

SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of April, 2014 by Linda Wanzek



Notary Public

My commission expires: June 26, 2017

